IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TONY KOLE, *et al.*,	
Plaintiffs,	**No. 11-CV-03871**
v.	**Hon. Judge Thomas M. Durkin** **U.S. District Judge**
VILLAGE OF NORRIDGE,	**Hon. Morton Denlow** **U.S. Magistrate Judge**
Defendant.	

DEFENDANT'S REPLY IN FURTHER SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Village is entitled to judgment as a matter of law on all of Plaintiffs' claims because the Plaintiffs' claims for injunctive relief are moot, and they lack standing for their damages claims. Plaintiffs' claimed right to commercial arms sales in sensitive places falls outside the scope of the Second Amendment right, and the Village's weapons dealer regulations bear a substantial relationship to its important public safety goals. Plaintiffs' substantive due process claim is better analyzed under the Second Amendment, and the Village's weapons dealer regulations satisfy the forgiving scrutiny under the Dormant Commerce Clause. Plaintiffs' self-imposed exterior signage regulations are consistent with the First Amendment, and their duplicative Illinois constitution and retaliation claims fail for the same reasons as their substantive claims. Finally, Plaintiffs have abandoned their equal protection claim. As a result, nothing that Plaintiffs have offered in response to the Village's opening memorandum presents a genuine issue of material fact, or anything that alters the conclusion that the Village is entitled to judgment as a matter of law on all counts of the Third Amended Complaint.

ARGUMENT

Roughly half of Plaintiffs' response to the Village's motion for summary judgment is a verbatim recitation of the memorandum in support of the Plaintiffs' motion for summary judgment. The Village has already responded to these arguments, in its response to Plaintiff's memorandum.

Pltfs. Memo. Support Mot. Summ. J. (Doc No. 206)	Pltfs. Resp. Def. Mot. Summ. J. (Doc No. 226)	Def. Resp. Pltfs. Mot. Summ J. (Doc. No. 225)
1 (Introduction)	1 (Introduction)	1-2 (Introduction)
6 (Summary Judgment Standard)	2-3 (Summary Judgment Standard)	-
3-6 (Summary of Argument)	4-5, 6-9 (Standing)	2-5 (Standing)
6-15 (Second Amendment (2011 Ordinance))	13-22 (Second Amendment (2011 Ordinance))	5-16 (Second Amendment)
15-23 (Second Amendment (2013 Ordinance))	22-32 (Second Amendment (2013 Ordinance))	5-18 (Second Amendment)
23-25 (Dormant Commerce Clause)	34-37 (Dormant Commerce Clause)	18-19 (Dormant Commerce Clause)
25-28 (First Amendment)	37-39 (First Amendment)	19 (First Amendment)

Accordingly, this reply will focus on new matters raised by the Plaintiffs in response to the Village's motion for summary judgment. None of the new matters raised by Plaintiffs change the fact that the Village is entitled to judgment as a matter of law on all of Plaintiffs claims.

I. Plaintiffs' Claims are not Justiciable because Plaintiffs' Facial Challenges are Moot, and Plaintiffs Lack Standing for their As-Applied Challenges

A. The Village should be Granted Judgment as a Matter of Law on Plaintiffs' Injunctive Relief Claims

In its opening memorandum, the Village argued it is entitled to judgment as a matter of law on Plaintiff's moot facial challenges because the 2011 Ordinance and 2013 Ordinance have been repealed, and the Agreement will expire by its own terms with the conclusion of this litigation. (Doc. No. 195 at 2-3). In response, Plaintiffs concede they are no longer pursuing their claims for injunctive relief, asking for them to be dismissed without prejudice. (Doc. No. 295 at 3). While the Village would accept Plaintiffs' voluntary dismissal, Plaintiffs presented no evidence creating a reasonable expectation that the 2011 Ordinance or 2013 Ordinance would be reenacted, so the Village is still entitled to judgment as a matter of law on Plaintiffs' requested injunctive relief.

B. Plaintiffs make no As-Applied Challenge to the Agreement, 2011 Ordinance, or 2013 Ordinance

Plaintiffs claim they make an as-applied challenge to the Village's regulations (Doc No. 226 at 4 (describing damages claims "as-applied")), but Plaintiffs' only raise facial arguments in defense of their claims (Doc. No. 226 at 15). To the extent that Plaintiffs only make facial claims, they are moot for the reasons discussed in Section I.A, *supra*. To the extent that Plaintiffs do, in fact, make as-applied challenges, the application of individual facts do matter, contrary to Plaintiffs' assertion. (*Id.*) As discussed below, the underlying facts demonstrate that Plaintiffs lack standing to challenge the Village's regulations.

C. Plaintiffs Lack Standing for any Damages Claims

Plaintiffs insist their claims for damages are not moot. (Doc. No. 295 at 3). Plaintiffs apparently seek damages based on the challenged regulations 1) on behalf of their would-be customers; and 2) as-applied to Plaintiffs. Plaintiffs do not have standing to recover damages on behalf of their would-be customers. Furthermore, Plaintiffs' lack standing to challenge the self-imposed conditions in the Agreement, or in a 2011 Ordinance that never applied to them. Plaintiffs also lack standing for an as-applied challenge the 2013 Ordinance, for lack of any serious effort to operate a physical retail location.

1. Plaintiffs do not have Standing to Recover Damages on Behalf of their Would-be Customers

Plaintiffs cannot establish standing to recover damages on behalf of their would-be customers because the requested damages relief requires the participation of individual would-be customers in the lawsuit. To establish associational standing, Plaintiffs "must show that (1) its would-be customers would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to its business purposes; and (3) neither the claim asserted nor the relief requested requires the participation of individual would-be customers in the lawsuit." (*Second Amendment Arms v. City of Chi.*, 135 F. Supp. 3d 743, 751 (N.D. Ill. 2015)). Unlike Kole and the would-be customers in *Second Amendment Arms*, Plaintiffs in this case are no longer seeking prospective injunctive relief, and now only seek damages, which would require individualized proof and participation by individual would-be customers in the lawsuit. (*Warth v. Seldin*, 422 U.S. 490, 516 (1975) (associational standing must be denied where injury alleged is "peculiar to the individual member concerned, and both the fact and extent of inquiry would require individualized proof")). The damages and identities of the would-be customers are not ascertainable, and therefore Plaintiffs lack standing to recover damages on behalf of their would-be customers.

2. Plaintiffs Lack Standing to Challenge their Self-Imposed Conditions in the Agreement

Contrary to Plaintiffs' assertion (Doc. No. 226 at 15), Plaintiffs' personal situation is relevant because they cannot recover damages on behalf of their would-be customers. Plaintiffs cannot establish standing to recover damages on behalf of themselves due to their personal situation. Nearly all of the conditions in the Agreement were conditions required by the Plaintiffs' lessor, and other conditions provided by the Plaintiffs. (Doc. No. 195 at 3-5). Like the employment agreement in *Snepp*, the Plaintiffs' license Agreement with the Village involved a high degree of trust. (*Snepp v. U.S.*, 444 U.S. 507, 510 (1980)). The United States trusted Snepp not to disclose information relating to the CIA without submitting the information for clearance. (*Id.* at 510-11). The Village trusted Plaintiffs to operate their business in a sensitive place, in the manner Plaintiffs represented to the Village. (Doc. No. 195 at 4). The Supreme Court upheld Snepp's voluntary waiver of his rights, and the Court should uphold Plaintiffs' voluntary waiver in this case.

The Agreement incorporated many of the requirements in Plaintiffs' lease, including a prohibition on exterior signage. (Doc. No. 199 ¶ 22). Plaintiff claims that exterior signage was allowed with the landlord's permission (Doc. No. 226 at 6), but that misrepresents the terms of Plaintiffs' lease for an interior office:

> "No sign, advertisement or notice shall be inscribed, painted or affixed on any part of the outside or inside of Building, except on the glass of the doors and windows of the room leased and on the directory board, and then only of such color, size, style, and material as shall be first specified by the Lessor in writing, endorsed on this lease." (Doc. No. 190-5 (Rule 1)).

Plaintiff recalls conversations with his landlord about building-out a possible retail space in another unit (Doc. No. 226 at 6; Doc. No. 190-1, 51-54); but we cannot verify Plaintiffs' recollection because, unfortunately, the landlord is deceased. (Doc. No. 190-2 at 10, ll. 18-23). The best evidence of the landlord's intentions, however, are the terms that the Plaintiff and the landlord agreed to in writing. (Doc. No. 199 ¶ 22). Therefore, the terms in the Agreement reflect the terms that Plaintiffs first voluntarily agreed upon with their landlord, and were not the product of any alleged coercion by the Village.

Plaintiffs claim this case is different because they were under economic duress, but any alleged economic duress was self-imposed. Plaintiffs were the ones that proposed an unconventional online-only business model to the Village (LR St. ¶ 9, Ex. 1, p. 26, Ex. 4; Doc.

No. 190-1, at 103-04 (Plaintiffs know of no other online-only weapons dealers)). Plaintiffs claim that an August 11, 2010 email from Village Building Commissioner Brian Gaseor induced the Plaintiffs in to signing a lease for their office premises (Doc. No. 226 at 4; Doc. No. 197 ¶ 8 (*citing* Doc. No. 198-3), but that email only encouraged Plaintiffs to conduct their own investigation:

> "Please go to our web site www.villageofnorridge.com and check our ordinance for Weapons Dealers. If you wish to proceed further go to Business Licensing and fill out a Business License Application and return with the necessary fees. Lots "B-3" GENERAL BUSINESS DISTRICT and "C" COMMERCIAL DISTRICT could accommodate your office. (Doc. No. 219-1).

Gaseor's statement is not the kind that could bind the Village, and any reliance on that statement that would cause Plaintiff to enter a lease would not be reasonable. (*Patrick Eng'g, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 40).

Most significantly, Plaintiffs claim of economic duress based on the lease is defeated by the fact that the terms of the lease allowed Plaintiffs to terminate, if they were unsuccessful in obtaining a weapons dealer license:

> "If on or before 12-31-2010 Lessee has exercised due diligence but has failed to obtain Federal Firearms License from the A.T.F.E. and Weapons Dealer License from the Village of Norridge, upon notice to Lessor by Lessee, this lease shall be mutually cancelled" (Doc. No. 198-7 ¶ 9).

Plaintiffs signed a lease beginning October 1, 2010 so their business could conduct its due diligence, and if Plaintiffs did not like the terms in the Agreement for their weapons dealer license, Plaintiffs could have terminated the lease before December 31, 2010. Therefore, Plaintiffs make no showing of possible economic liability for failure to sign the Agreement, and certainly no showing of "extreme financial distress" required to support their claimed economic duress. (*Rubin v. Laser*, 301 Ill. App. 3d 60, 68 (1st Dist. 1998)).

Plaintiffs' also claim duress based on an allegedly delayed federal inspection by the U.S. Dept. of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives ("***ATF***"), which is not attributable to the Village. (Doc. No. 226 at 5). Plaintiffs fail to explain how the Village could interfere with federal agency's decision whether to proceed with an alleged November 2, 2016 inspection. (Doc. No. 180 at ¶ 9). Apparently the alleged delay was for lack of local approvals, and Plaintiffs did not file their application for a Village weapons dealer license until November 16, 2010 (Doc. No. 180 at ¶ 8). The Village promptly processed the application two weeks later. (Doc. No. 180-8). Therefore, the Village did not "hold up" Plaintiffs' ATF inspection, and their claim to the contrary is only supported by a hearsay statement. (Doc. No. 219 ¶ 9).

In any event, Plaintiffs' claim that the ATF inspection was required for an FFL is contradicted by ATF regulations, which give the ATF a right, but do not necessarily require, an inspection for an FFL. (27 CFR § 478.23). Finally, Village approvals could not have been "holding up" Plaintiffs' ATF approvals because the Gun Control Act grants the applicant 30 days after approval to come in to compliance with local laws. (18 U.S.C. § 923(d)(1)(F)). The Village promptly acted on Plaintiffs' local approvals, and did not place the Plaintiffs under any kind of duress. Where Plaintiffs fail to show they were in a position of extreme financial distress to sustain a showing of economic duress, Plaintiffs lack standing to challenge the self-imposed terms in the Agreement.

3. Plaintiffs Lack Standing to Pursue an As-Applied Challenge to the 2011 Ordinance because the 2011 Ordinance Never Applied to Plaintiffs

Plaintiffs cannot maintain a challenge to the 2011 Ordinance because they were exempt from the 2011 Ordinance. (Doc. No. 195 at 5; Doc. No. 225 at 3). The Agreement and the 2011 Ordinance granted Plaintiffs the Village's exclusive weapons dealer license. (Doc. No. 195 at 5). Plaintiffs pursued a needless injunction based on the apparently mistaken belief that the sunset for weapons dealer licensing in the Village would be a sunset for weapons dealers in the Village; in fact, the plain language of the 2011 Ordinance provided that no license would be required for weapons dealers at the expiration of the sunset period. (Doc. No. 226 at 3). The favorable terms of the Agreement and the 2011 Ordinance leave Plaintiffs without an actual injury required for standing to challenge these regulations as applied to them.

4. Plaintiffs Never Made Concrete Plans to Open a Physical Gun Store

Plaintiffs lack standing to challenge the 2011 Ordinance or 2013 Ordinance because they made no serious effort to open a physical gun store. (Doc. No. 225 at 4; Doc. No. 195 at 6-7). Plaintiffs' expressed desire to open a retail location in the Village rings hollow because, unlike the weapons dealer Plaintiff in *Second Amendment Arms*, Plaintiffs never filed an application for a weapons dealer license at any retail location in the Village. (*Second Amendment Arms*, 135 F. Supp. 3d 743, 760 (N.D. Ill. 2015)). Plaintiffs' reliance on the standing analysis in *Six Star* is misplaced because, unlike the adult theater business in that case, Plaintiff never took concrete steps to open a retail location in the Village, and First Amendment prior restraint principles do not extend in to the Second Amendment context. (Compare *Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795, 802 (7th Cir. 2016) (relying on prior restraint principles to establish standing) with *Moustakas v. Margolis*, 154 F. Supp. 3d 719, 732 (N.D. Ill. 2016) (rejecting prior restraint principles in Second Amendment context), *aff'd sub nom. Berron v. Ill. Concealed Carry Licensing Review Bd.*, 825 F.3d 843 (7th Cir. 2016); *Bolton v. Bryant*, 71 F. Supp. 3d 802, 817 (N.D. Ill. 2014) (same); *DeServi v. Bryant*, 70 F. Supp. 3d 921, 927 (N.D. Ill. 2014) (same)). Finally, Plaintiffs' allegations about the new owner excluding him from his office premises following the lapse of his lease are irrelevant, and not attributable to the Village. (Doc. No. 226 at 7-8). Plaintiffs lack standing to challenge the 2013 Ordinance because Plaintiffs always intended to operate an online-only weapons dealer business, and made no serious effort to operate a physical retail location anywhere. The Village should be granted judgment as a matter of law because Plaintiffs lack standing for all of their remaining challenges to Village regulations.

II. The Agreement, 2011 Ordinance, and 2013 Ordinance Lawfully Regulate the Commercial Sales of Arms in Sensitive Places in accordance with the Second Amendment (Count I)

Once again, Plaintiffs do not clearly analyze their Second Amendment claim according to the Second Amendment framework set forth in *Ezell v. City of Chicago*, 651 F.3d 684, 702-03 (7th Cir. 2011). The restricted activity, commercial sales of arms in sensitive places, is not protected by the Second Amendment. (Doc. No. 225 at 5; Doc No. 195 at 7-20). Even if the regulated activity is not outside the scope of the Second Amendment, the Village's regulations bear a substantial relationship to important government interests, satisfying the appropriate level of scrutiny for presumptively lawful regulatory measures. (Doc. No. 225 at 5; Doc. No. 195 at 20-34).

A. The Restricted Activity, Commercial Sales in Sensitive Places, is not Protected by the Second Amendment

Commercial arms sales require weapons possession, so the Village's thorough analysis of restrictions on weapons possession in public and in sensitive places confirms the Second Amendment was never understood to require commercial arms sales in sensitive places. (Doc. No. 225 at 5-11; Doc. No. 195 at 7-22). While not expressly stated in the Village's 1972 Ordinance or 2011 Ordinance, all of the Village's weapons dealer regulations were informed by this principle, which dates back as early as 1299. (Doc. No. 195 at 8). Plaintiffs' mistakenly dismiss this required historical analysis as "irrelevant," and inappropriately equate the blanket weapons possession prohibition considered in *Moore v. Madigan*, with the more limited Village regulations focusing on commercial sales in sensitive places in the instant case. (Doc. No. at 226 at 12 (citing *Moore*, 702 F.3d 933 (7th Cir. 2013)). Plaintiffs' citation to the "prohibited areas" in the Firearm Concealed Carry Act confirms that prohibitions on weapons possession (and sales) in sensitive places, and their surrounding parking areas and property, fall outside the scope of the Second Amendment right. (Doc. No. 226 at 12 (*citing* 430 ILCS 66/65)). Regulation of commercial arms sales in sensitive places is not an exception swallowing the rule because this activity was never part of the rule in the first place.

Plaintiffs present no binding authority that commercial arms sales fall within the scope of the Second Amendment at all. (Doc. No. 225 at 10-11). Plaintiffs' cited persuasive authority acknowledges that any claimed right to acquire a firearm is far from absolute. Plaintiffs' reliance on *Teixeira v. County of Alameda* is misplaced because even the limited acquisition right discussed by the panel in that case is called in to doubt by the thorough weapons possession prohibition analysis by the *en banc* opinion in *Peruta v. County of San Diego*. (Doc No. 225 at 11 (*Teixeira*, 822 F.3d 1047, 1055 (9th Cir. 2016); *Peruta*, 824 F.3d 919, 940 (9th Cir. 2016)). Plaintiffs' citation to founding-era home gunpowder storage regulations does nothing to place the sale of commercial arms in sensitive places within the scope of the Second Amendment right. (Doc No. 226 at 27). Even if a right to commercial arms sales exists, that right clearly does not extend to sensitive places.

The Village's regulation of commercial arms sales in sensitive places are a focused implementation of longstanding prohibitions on weapons possession in sensitive places. The Village's licensing regulations and zoning requirements are just modern-day vehicles for these longstanding principles. Plaintiffs suggest that the Village's regulations must be very old in order to be longstanding (Doc. No. 226 at 10-11), but the Seventh Circuit rejects the notion "that the passage of time creates an easement across the Second Amendment." (*Friedman v. City of*

Highland Park, Illinois, 784 F.3d 406, 408 (7th Cir. 2015) (citing *U. S. v. Skoien*, 614 F.3d 638 (7th Cir.2010) (*en banc*)). If an "ordinance stays on the books for a few years, that shouldn't make it either more or less open to challenge under the Second Amendment." (*Id.*) For a presumptively lawful regulatory measure to be "longstanding" does not require a founding-era analogue. (Doc. No. 195 at 12-13). The prevalence of commercial arms sales regulations, and prohibitions on weapons possession in sensitive places, confirms that commercial arms sales in sensitive places fall outside the scope of the Second Amendment right. (Doc. No. 225 at 9-11; Doc. No. 195 at 12-20). The Village is entitled to judgment as a matter of law because Plaintiffs fail to establish that the regulated activity in the challenged regulations is protected by the Second Amendment.

B. The Village's Justifications Satisfy Intermediate Scrutiny

As the Village discussed in its opening brief, and its response to Plaintiffs' motion for summary judgment, intermediate scrutiny is appropriate for the evaluating Plaintiffs' as-applied challenges to the Village's presumptively lawful regulatory measures. (Doc. No. 225 at 11-13; Doc. No. 195 at 21-22). Plaintiffs, once again, urge the application of strict scrutiny, but their new cited authority does not support their position. (Doc. No. 226 at 28). First, Plaintiffs cite *U.S. v. Mazzarella*, which evaluated a statute prohibiting possession of handguns with obliterated serial numbers under *intermediate* scrutiny. (614 F.3d 85, 97 (3d Cir. 2010)). Next, Plaintiffs cite *Binderup v. Attorney Gen. United States of Am.*, which evaluated a statutory firearms possession prohibition as-applied to two non-violent misdemeanants under *intermediate* scrutiny. (836 F.3d 336, 356 (3d Cir. 2016)). Finally, Plaintiffs cite *Tyler v. Hillsdale Cty. Sheriff's Dep't.*, which evaluated a statutory firearms possession prohibition as-applied to a long-former mental institution committee under *intermediate* scrutiny. (837 F.3d 678, 692 (6th Cir. 2016)). Unlike the possession regulations at issue in those cases, the Village's regulations in this case do not prohibit possession, but only limit commercial sales in sensitive places. Plaintiffs' cited authority actually confirms the appropriateness of intermediate scrutiny for the as-applied challenge in the instant case, a standard the Village easily satisfies. (Doc. No. 225 at 11-18; Doc. No. 195 at 20-34).

1. The Conditions on the Commercial Sale of Arms in Sensitive Places in the Agreement and 2011 Ordinance were Substantially Related to the Village's Important Public Safety Goals

Plaintiffs offer only two new points in support of their challenge to the 2011 Ordinance. First, Plaintiffs claim that they would have been forced out of business on April 30, 2013, if not for their prosecution of this litigation. The terms of the 2011 Ordinance did not "ban" weapons dealers as of April 30, 2013, and Plaintiffs were not "forced out of business as of that date" because the 2011 Ordinance's sunset provision ended weapons dealer licensing in the Village, while allowing Plaintiffs to continue their business under the Agreement. (Doc. No. 226 at 3). Plaintiffs' litigation did nothing to change these facts.

Next, Plaintiffs go on to state that "[t]hough Defendant no longer seems to be disputing this basic legal point, Defendant's 2011 gun store ban unquestionably violated the constitutional guarantees of purchasing arms for self-defense and lawful purposes [. . . .]" (Doc. No. 226 at 14). To the contrary, the Village strenuously disputes Plaintiffs' assertion that the 2011 Ordinance is a "gun store ban," and Plaintiffs' alleged violation of a claimed right to "purchasing arms." The Agreement and the temporary 2011 Ordinance allowed Plaintiffs to operate while the Village studied new weapons dealer regulations under a new regime of gun rights. (Doc. No. 225 at 15). The Village should be granted judgment as a matter of law because the Agreement and 2011

Ordinance were substantially related to the Village's important public safety interests. (Doc. No. 195 at 26-27).

2. The 2013 Ordinance's Conditions on the Commercial Sale of Arms in Sensitive Places were Substantially Related to the Village's Important Public Safety Goals

Plaintiffs do not offer much of anything new in support of their challenge to the 2013 Ordinance. Plaintiffs do note they are dropping their claim for injunctive relief as to the 2013 Ordinance's indemnification agreement requirement (Doc. No. 226 at 24 n.5); but as discussed in Section I.C above, Plaintiffs offer no facts to support their standing to challenge this requirement as-applied to them. Plaintiffs never applied for a weapons dealer license under the 2013 Ordinance at any location, and never engaged the Village in negotiations for such an agreement. (Doc. No. 195 at 33-34). If the Village had the opportunity, the Village would have reached a mutual indemnification agreement with Plaintiffs that would have respected Plaintiffs' rights, while reducing the Village's liability in connection with its issuance of a license. (Doc. No. 195 at 34). The Village is entitled to judgment as a matter of law as to Plaintiffs' as-applied challenge to the indemnification agreement provision the 2013 Ordinance.

Next, the Court should decline Plaintiffs invitation to consider the Village's adoption of the 2014 Ordinance, as evidence of the 2013 Ordinance's alleged unconstitutionality. (See, e.g., Doc. No. 226 at 24). Such a practice would "disincentivize states and municipalities from repealing their enactments lest repeal lead to an inference that the previous legislation had been unconstitutional. We avoid creating such incentives in other settings. Fed.R.Evid. 407 (prior remedial measures), for example, forbids admitting evidence of a company's redesigning a product to prove that the previous design was defective." (*Markadonatos v. Vill. Of Woodridge*, 760 F.3d 545, 550 (7th Cir. 2014) (Posner, J., concurring)). Every community, including the

Village, should be able to adopt regulations to increase the land area available for weapons dealers, without fear that this action will be used as evidence of the prior regulation's unconstitutionality.

Additionally, the Court should disregard Plaintiffs' irrelevant, and confusing, GIS diagram in Plaintiffs' response, which seems to be depicting the distance between Plaintiffs' Montrose office, and a door to Ridgewood High School. (Doc. No. 226 at 23). Both the 2013 Ordinance and the 2014 Ordinance measure the sensitive place buffers from property line to property line (Doc. No. 190-11 (Sec. 22-362); Doc. No. 190-12 (Sec. 22-362)), because the subject buildings and surrounding property are both sensitive places. Plaintiffs' conclusions about the 2014 Ordinance's distance requirements applied to the Maggio location and the Montrose office are incorrect, and irrelevant to the Plaintiffs challenge to the 2013 Ordinance.

Moreover, the Village strongly rejects Plaintiffs' characterization of the Village's motives. The Village made an Agreement to allow the Plaintiffs to operate business they presented for the duration of the 2011 Ordinance and beyond, while the Village developed the a new licensing scheme for weapons dealers under a new regime of gun rights in the 2013 Ordinance. (Doc. No. 225 at 15-18).

Finally, Plaintiffs repeat their unprecedented claim that gun stores may only be regulated for secondary effects. (Doc. No. 226 at 32). Even if First Amendment secondary effects principles applied under the Second Amendment, the Village rightfully regulates weapons possession in sensitive places, a secondary effect of weapons sales and long-recognized important governmental interest dating back to common law. (Doc. No. 225 at 16).

Even if Plaintiffs have standing, Plaintiffs new arguments fail to save their Second Amendment claim because the undisputed facts confirm that the Agreement, 2011 Ordinance, and 2013 Ordinance are substantially related to the Village's important public safety goals, by reducing weapons possession and crime in sensitive places. The Village is entitled to judgment as a matter of law.

III. The Village is Entitled to Judgment as a Matter of Law on Plaintiffs' Due Process Claim, which is a Second Amendment Claim in Due Process Clothing (Count II)

Plaintiffs are not entitled to pursue an independent substantive due process claim because Plaintiffs' substantive due process claim is nothing more than a Second Amendment claim in Fourteenth Amendment clothing. (Doc. No. 195 at 34-35). This does not mean, as Plaintiffs suggest, that if their Second Amendment claim fails, they get another bite at the apple under the Fourteenth Amendment. (Doc No. 226 at 33). As the court concluded in *Second Amendment Arms v. City of Chicago*, Plaintiffs' claim is property analyzed under the Second Amendment, so Plaintiffs' due process claim should be dismissed. (135 F. Supp. 3d 743, 763-64 (N.D. 2015)).

The cases cited by Plaintiffs do not change the analysis because many of them are not even substantive due process cases. (*McBurney v. Cuccinelli*, 780 F. Supp. 2d 439, 446 (E.D. Va. 2011) (Privileges and Immunities clause); *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 95 (2d Cir. 2003)(same). Plaintiffs' reliance on the rejected *Lochner*-era view of substantive due process is misplaced. (*Lincoln Fed. Labor Union No. 19129, A.F. of L. v. Nw. Iron & Metal Co.*, 335 U.S. 525, 535 (repudiating case cited by Plaintiffs, *Allgeyer v. Louisiana*, 165 U.S. 578 (1897)). The Village should be granted judgment as a matter of law because Plaintiffs offer no valid reason to consider their claim under the Fourteenth Amendment.

IV. The Important Local Benefits of the 2011 Ordinance and 2013 Ordinance Exceed any Burden on Interstate Commerce (Count III)

The Village is entitled to summary judgment on Plaintiffs' Dormant Commerce Clause claim because the Village's weapons dealer regulations have important local benefits and, by comparison, do not impose a "clearly excessive" burden on interstate commerce. (Doc. No. 225 at 18; Doc. No. 195 at 35-37). Plaintiffs' only new offering is a citation to a Second Amendment case, not a Dormant Commerce Clause case. (Doc. No. 226 at 36 (citing *Illinois Ass'n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 946 (N.D. Ill. 2014)("***IAFR***")). The standard for a Dormant Commerce Clause claim is likened to rational basis review, and nowhere near approaches the "rigorous showing" required for *IAFR*'s facial challenge sweeping ban on firearm sales and transfers affecting all law-abiding adult Chicagoans. (Doc. No. 195 at 21). In this case, however, only a challenge to limited restrictions on commercial sales in sensitive places remains, as-applied to the Plaintiffs. Where the Village's weapons dealer regulations are substantially related to the Village's important public safety goals, the standard for a Dormant Commerce Clause Claim is more than satisfied, and the Village is entitled to judgment as a matter of law.

V. The Agreement Lawfully Prohibits Plaintiffs' Suggested Off-Premise Signs in Accordance with the First Amendment (Count IV)

Plaintiffs' abandoned their First Amendment claim regarding the display of firearms (Doc. No. 226 at 42 n.7), and now only challenge the prohibition on external signs that Plaintiffs agreed to in their lease and in the Agreement. (Doc. No. 226 at 37-39). The Village should be granted judgment as a matter of law on the remaining First Amendment claim because Plaintiffs' self-imposed off-premise advertising restrictions in the Agreement directly advance the Village's aesthetic interests in prohibiting exterior signage for an off-site business at that location. (Doc. No. 225 at 23; Doc. No. 195 at 38-39).

VI. The Village is Entitled to Judgment as a Matter of Law on Plaintiffs' Illinois Constitution Claims (Count V)

Plaintiffs have abandoned all of their claims under the Illinois Constitution, except the one under Illinois' version of the Second Amendment. (Doc. No. 226 at 40-41). In addition to a judgment on Plaintiffs' abandoned claims, the Village is entitled to judgment as a matter of law for Plaintiffs' claim under Illinois' narrower version of the right to bear arms, for the same reasons that the Village is entitled to judgment as a matter of law on Plaintiffs' claim under the U.S. Constitution. (Doc. No. 225 at 5-18; Doc. No. 195 at 7-34, 41).

VII. Plaintiffs' Duplicative Retaliation Claims Fail for the Same Reasons as their Substantive Claims (Counts VI and VII)

The Village is entitled to judgment as a matter of law for Plaintiffs' duplicative retaliation claims for the same reasons the Village is entitled to judgment as a matter of law on Plaintiffs' substantive Second Amendment and Fourteenth Amendment claims. (Doc. No. 225 at 23; Doc. No. 195 at 42-43). The facts and authority cited by Plaintiffs does nothing to change this analysis.

Plaintiffs cite no authority that a retaliation claim under the Second Amendment even exists. (*Kaminsky v. Schriro*, No. 3:14-CV-01885 (MPS), 2016 WL 3460303, at *9 n.6 (D. Conn. June 21, 2016)("I have been unable to find any case law recognizing a claim of retaliation arising under the Second Amendment. The cases that Kaminsky cites in support of this claim involve exclusively First Amendment retaliation claims."); *Schaefer v. Whitted*, 121 F. Supp. 3d 701, 711 (W.D. Tex. 2015) ("the Court can find no cases in the Fifth Circuit recognizing a viable retaliation claim under the Second Amendment . . .")). Additionally, Plaintiffs cite no authority to support the availability of a retaliation claim for the alleged exercise of their *Lochner*-era substantive due process rights. (See Section III, *supra*). Plaintiffs rely on First Amendment retaliation cases (Doc. No. 226 at 41-43), but do not satisfy the standards established to sustain a similar, but novel, claim under the Second or Fourteenth Amendments.

The undisputed facts show that Plaintiffs apparently scheduled an ATF inspection prior to obtaining their local approvals. (Doc. No. 180 at ¶¶ 8-9). When Plaintiffs finally applied for a weapons dealer license, Plaintiffs and the Village promptly reached an Agreement based on Plaintiffs' suggested terms and the terms of their lease. (Doc. No. 180-8). Plaintiffs could have terminated their lease had they not obtained satisfactory approvals. (Doc. No. 198-7 ¶ 9). The Agreement allowed Plaintiffs to operate, while the Village studied its weapons dealer regulations under a new regime of gun rights. (Doc. No. 225 at 15). Plaintiffs were exempt from the 2011 Ordinance, and Plaintiffs did not seriously try to operate under the 2013 Ordinance. (Doc. No. 195 at 5-6).

Plaintiffs cannot establish that their alleged attempt to exercised an unrecognized "right to sell" firearms was the "but for" causation of any alleged deprivation. (*Fairley v. Andrews*, 578 F.3d 518, 525 (7th Cir. 2009)(First Amendment retaliation case, rejecting "motivating factor" test)). Plaintiffs' reliance on the "motivating factor" analysis in *Woodruff v. Mason* is misplaced, but that opinion rightly notes, "[i]f the natural tensions that result from adversarial proceedings and regulatory enforcement actions sufficed to establish evidence of retaliatory motive, then the regulatory scheme could very well be undermined." (542 F.3d 545, 552 (7th Cir. 2008) (First Amendment retaliation case)). Plaintiffs' experience with the Village may have been unpleasant, but the Village obviously acted because its 1972 Ordinance was out of date, not because

Plaintiffs sought to exercise their Second Amendment rights. The Village is entitled to judgment as a matter of law on Plaintiffs' retaliation claims under the Second and Fourteenth Amendment.

VIII. Plaintiffs' are no Longer Pursuing their Equal Protection Claim (Count VIII)

The Village is entitled to judgment as a matter of law on Count VIII because Plaintiffs abandoned their Equal Protection claim. (Doc. No. 226 at 43-44).

CONCLUSION

In conclusion, Plaintiffs' claims are not justiciable because Plaintiffs' facial claims for injunctive relief are moot, and Plaintiffs lack standing for any as-applied claims for damages. In any event, Plaintiffs claims lack merit because any right to commercial sales in sensitive places falls outside the scope of the Second Amendment, and the Village's conditions on commercial arms sales are substantially related to the Village's important public safety goals. Plaintiffs' substantive due process claim fails because it should be analyzed under the Second Amendment. Plaintiffs' Dormant Commerce Clause claim fails because any burden on interstate commerce is not clearly excessive in comparison to the public safety benefits of the Village's regulations. Plaintiffs' self-imposed exterior signage requirements in the Agreement are consistent with the First Amendment. Finally, Plaintiffs' retaliation claims and Illinois Constitution claims fail for the same reasons as their substantive claims, and Plaintiffs have abandoned their equal protection claim.

WHEREFORE, Defendant prays that this Court grant judgment as matter of law for the Defendant, and against the Plaintiffs, as to each count of the Third Amended Complaint.

VILLAGE OF NORRIDGE

/s/ Daniel J. Bolin

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CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2016, I electronically filed the foregoing **DEFENDANT'S REPLY IN FURTHER SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to:

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